



POLICE DEPARTMENT
Office of Deputy Commissioner,
Legal Matters
One Police Plaza, Room 1406A
New York, New York 10038
FOILAppeals@NYPD.org

December 4, 2019

Freddie Martinez
Muckrock
76825-28081409@requests.muckrock.com

RE: FREEDOM OF INFORMATION LAW
REQUEST: FOIL-2019-056-12167
Re: Facial Recognition Technology

Dear Mr. Martinez:

This letter is in response to your letter dated November 13, 2019, received by this office on November 19, 2019, appealing the determination of the Records Access Officer (RAO) made on October 23, 2019 regarding records requested from the New York City Police Department. Your request, pursuant to the Freedom of Information Law, was originally received by the FOIL unit on July 18, 2019 and subsequently denied by the RAO.

Your appeal of that determination is denied, first, because a diligent search has been conducted for records related to any existing contracts between this agency and the three companies identified in your request; however, no records were located. Upon conferral with the NYPD Contract Administration Unit, it was determined that this agency has not contracted with any of the three parties and, therefore, no records responsive to your request as it relates to any of these three companies could be located.

The New York Court of Appeals has determined that “[w]hen an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89(3) requires the agency to certify that it does not have possession of a requested record or that such record cannot be found after diligent search . . . Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required” *Raittley v. New York City Police Dept.*, 96 NY2d 873, 875; 730 NYS2d 768 (2001).

Furthermore, in 2009, the Appellate Division held that an agency cannot produce documents it does not possess or cannot disclose and that the Court cannot require respondents to produce documents that they certify they cannot find after a diligent search because petitioner “has received all that he . . . is entitled to under the law” *Bernstein Family Ltd. P’ship v. Sovereign Partners, L.P.*, 66 AD3d 1, 8; 883 NYS2d 201, 206 (1st Dept 2009).

To the extent that you seek any other records related to the NYPD’s use of Facial Recognition Technology, your appeal is denied. Primarily, your request fails to reasonably describe a record in a manner that could enable a search. Public Officers Law Section 89(3)

COURTESY • PROFESSIONALISM • RESPECT

requires that a FOIL request describe the records it seeks in a manner that can reasonably lead to the retrieval of records maintained by the entity to which the request was directed. Your request seeks a variety of broadly-described records such as “financial records”, “purchase orders”, “invoices”, “memoranda”, “marketing materials”, etc., and does not provide a time frame for which you seek records. In considering the requirement that records be “reasonably described”, the Court of Appeals has held that whether or the extent to which a request meets the standard may be dependent on the nature of an agency’s filing, indexing or records retrieval mechanisms [see Konigsburg v. Coughlin, 68 NY2d 245 (1986)].

When an agency has the ability to locate and identify records sought in conjunction with its filing, indexing and retrieval mechanisms, it was found that a request meets the requirement of reasonably describing the records, irrespective of the volume of the request. By stating, however, that an agency is not required to follow “a path not already trodden” (*id.*, 250) in its attempts to locate records, we believe that the Court determined, in essence, that agency officials are not required to search through the haystack for a needle, even if they know or surmise that the needle may be there. In short, agency staff are not required to engage in herculean or unreasonable efforts in locating records to accommodate a person seeking records. See, Committee on Open Government Advisory Opinion, FOI-AO-18949 (August 20, 2012).

The NYPD does not maintain or index records that can be located by simply using a keyword search such as “Facial Recognition”; rather, any records that may be responsive to your overbroad request would be maintained by any one of various units or commands – if not multiple commands – and absent a reasonably described request, gathering responsive records would require extraordinary efforts not required under POL §89(3). Furthermore, FOIL does not require “that an agency go through the haystack in an effort to locate needles” See, Committee on Open Government Advisory Opinion, FOI-AO-18863 (April 5, 2012) and because your FOIL request does not enable retrieval of responsive records, it does not meet the threshold requirement set forth in Public Officers Law 89(3)(a). Thus, an agency is not required to provide records in response to a FOIL request if the effort required to do so is unreasonable. For example, in *New York Comm. For Occupational Safety and Health v. Bloomberg*, 72 A.D.3d 153 (1st Dep’t 2010), the City argued, in part, that responding to petitioner’s extensive FOIL request would be burdensome and would unreasonably tax limited City resources. The First Department noted that the FOIL request “presents a situation where the volume of records is undisputedly large, and those records not only need to be retrieved and reproduced from a wide variety of sources, but redacted as well.” *Id.* at 162.

You may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision.

Sincerely,



Jordan S. Mazur

Sergeant

Records Access Appeals Officer

c: Committee on Open Government